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No. 846

In the Supreme Court of the United States

October Term, 1941.

JOE H. TIGER, *ET AL.*, *Petitioners*,

vs.

ANNIE BEAMS, *ET AL.*, *Respondents.*

UNITED STATES OF AMERICA, *Intervener.*

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

NORMAN L. MEYERS,
JAMES D. SIMMS,
Attorneys for Petitioners, Joe Tiger, et al.;
PAUL PINSON,
Attorney for Lucy Carns and Ellis Gentry.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1941.

No. .....

JOE H. TIGER; ANNIE PONDS; ALEX HAMILTON, Administrator of the Estate of Peter Hamilton, Deceased; Lucy Curns and J. Ellis Gentry, *Petitioners,*

vs.

ANNIE BEAMS; MELVINEY BARNETT DITZLER; THE Estate of Nellie Barnett, Deceased; The Estate of Jimmy Barnett, Deceased; Mahaley Fish Hickman; Winey Fish Lewis; Katie Fish Litzey; Frazier Fish; Milley Fish Gilroy; Charity Buckley, formerly Smith; William Fisher; Mariah Fisher Tompkins; Lewis Fisher; Rosa Fisher; Frances Sutton, *nee* Fisher; Marion Stevens, *nee* Fisher; Lawrence H. Fisher; Susie Conner; the Heirs of Emma Burgess, *nee* Conner; Jim Burgess, Husband, for Himself and as Next Friend of His Minor Children; William Burgess, Little John Burgess, Sissie Burgess and Noah Burgess and Joe Burgess, Adults; May (or Hannah) Conner; Carrie Hendrix, now Ryan; Norman Hendrix, and Richenda Pratt, now Smith; Rebecca J. Baker; Katie Williams, *nee* Knight; The Heirs of Lois Williams, Deceased; Marcellus L. Williams, a Minor; John F. Davis; Lucy Knight; Bamma Bear; Abbie Cosar, *nee* Conner; Willie Conner; John Conner; Chissie Stepney; Barney Stepney; Rhoda Gouge, *nee* Stepney; Ida Gouge, a Minor; Eliza Gouge, *Respondents.*

UNITED STATES OF AMERICA, *Intervener.*

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Norman L. Meyers and James D. Simms, on behalf of Joe H. Tiger, *et al.,* and Paul Pinson, on behalf of Lucy

Curns and Ellis Gentry, pray that a writ of *certiorari* issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered in the above case on September 2, 1941, affirming the judgment of the United States District Court for the Eastern District of Oklahoma.

Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 122 F. (2d) 777 (1941). The decision of the United States District Court for the Eastern District of Oklahoma is unreported; its findings are in the record at page 1005.

Jurisdiction.

The judgment to be reviewed was entered on September 2, 1941. A petition for rehearing was denied on October 10, 1941. The jurisdiction of this court is invoked under section 240 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A., title 28, Sec. 347).

Questions Presented.

1. Whether the appellants, of Negro blood, were deprived of a hearing in accordance with due process of law guaranteed by the Fifth Amendment to the Constitution of the United States because of prejudicial racial discrimination by the trial court which

a. Approved prior to trial an agreement (for mutual defense and offense) entered into by prevailing claimants "if it was a contract among restricted Indians to defeat the claims of Negroes and other non-citizen claimants;"

b. Made repeated statements that it would not believe Negroes or pay any attention to evidence of Negro claimants;

c. Usurped the function of attorneys for appellants and other parties of Negro blood in the cross ex-

amination of opposing witnesses and even in direct examination of witnesses;

d. Prejudiced the case and indicated such anti-Negro bias as to preclude judicial appraisal of the credibility of the witnesses of Negro blood and the weight to be given to their testimony.

2. Whether the active partisan participation of the Assistant United States Attorney on behalf of the prevailing claimants in this private litigation using in defiance of instructions his official position to sponsor witnesses for the prevailing claimants and to intimidate all others with threats of grand jury prosecutions interfered with due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

3. Whether the partisan activities of a Special Agent of the Federal Bureau of Investigation, working solely during the trial with the prevailing claimants in the preparation of their witnesses against other claimants, was so prejudicial as to be a violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

4. Whether the contract between the three prevailing groups of claimants in which they stipulated that they are a family related to each other and to Jackson Barnett and agreed to share whatever spoils any group obtained in this action, is void and contrary to public policy, conducive to perjury and the suppression of evidence, and improperly "implemented" the record in behalf of the Three Groups, patently influencing both courts below.

5. Whether the notation by some clerk on the census card of Jackson Barnett that one Siah was his father was competent and vital evidence, as held by both the lower courts, or was a mere collateral and incidental matter, pure

hearsay and incompetent for any purpose as held by this court in *Hegler* v. *Faulkner,* 153 U. S. 109.

6. Whether the findings of the District Court, affirmed by the Circuit Court of Appeals for the Tenth Circuit, are not clearly erroneous, without support of substantial evidence, due regard being given to the effect of the prejudicial anti-Negro bias of the trial court on its judging of the credibility of witnesses, and contrary to undisputed, unimpeached record and oral evidence not inherently improbable.

7. Whether the finding in 1903 by a *quasi*-judicial tribunal authorized by Congress to determine the heirs of Siah Barnett is final and binding as a judgment that Siah was not the father of Jackson, the decedent.

Facts.

1. This is a proceeding to determine the heirs of Jackson Barnett. Barnett, a Creek Indian, died in 1934 the possessor of a large estate from oil discovered on land allotted to him out of the lands of the Creek Nation. Wealth came to Barnett late in life long after he had severed family ties in his wanderings through Oklahoma and Kansas. In the last years of his life he lived in California where he purportedly married one Anna Laura Lowe Barnett. Through action by the Department of the Interior large gifts to this wife and to a mission society were invalidated, *Barnett* v. *Equitable Trust Co.,* 21 F. (2d) 325, 26 F. (2d) 350, *certiorari* denied 278 U. S. 626; *United States* v. *Mott,* 37 F. (2d) 860, 283 U. S. 747; *McGugen* v. *United States,* 109 F. (2d) 94; and the purported marriage was declared invalid, *Barnett* v. *United States,* 82 F. (2d) 765, *certiorari* denied 299 U. S. 546.

2. Various actions for the determination of the heirs of Barnett were transferred to the United States District Court

for the Eastern District of Oklahoma and were consolidated into this action. This was done at the instigation of the Department of the Interior which has taken the position of neutral stakeholder. Some 50 groups of claimants totalling approximately 600 persons became parties to the action, claiming heirship and to be entitled to all or part of the estate. There was dispute as to who was the father of Barnett, and likewise there was dispute as to the identity of Thlesothle, his mother. There were likewise claims of alleged wives of Barnett and their offspring.

3. Petitioners claim the mother of Barnett was Thlesothle, a full-blood Indian who had six sons. Petitioners, Joe Tiger, *et al.*, admittedly part Negro, trace descent from two of the claimed brothers of Jackson Barnett. The other members of the family died without issue.

4. The petitioners, Lucy Curns and Ellis Gentry, assert that their grandfather, Andrew Sullivan, a former Negro slave in the Creek Nation,* was the father of Jackson Barnett and that they are the daughter and son respectively of a paternal half-sister of Jackson Barnett.

5. The successful claimants are Three Groups of claim-

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*The names "Andrew" and "Jackson" naturally appear in the Barnett family of Creeks. This results from the friendship of a part Scotch and part Indian family named Barnard for "Old Hickory" during the Creek Indian wars. The decimation of the Creek forces resulted in marriage and cohabitation between Negro slaves and Creek women, both in Alabama and in Oklahoma, where the Creeks and their slaves were later transported. Such marriages were recognized by the Creeks as indicated by their own records from the year 1832 until 1859, when miscegenation was proscribed. Andrew Sullivan was a son of Quince Barnett, but took the name Sullivan by reason of his having been in Alabama a slave of the Sullivan family. Jackson, the son of a full-blood Indian woman, took the actual family name of his father. Tecumseh, also the son of Andrew Sullivan and Thlesothle, used his father's first name and was enrolled as a Union soldier under the name "Tecumseh Andrew."

ants (Siah Barnett Group, Conner Group and Stepney-Gouge Group), who have entered into a so-called family settlement agreement. (Clerk's Tr., Vol. 1, p. 481.) Prior to the agreement the Three Groups were antagonistic and had taken depositions under oath of numerous witnesses, each group challenging the relationship of the others to Jackson Barnett. By the agreement they stipulate to the issue in this action, namely that they are related and are a family all related to Jackson Barnett. Each of the Three Groups claimed in a different degree, so that no two groups under any set of favorable facts could possibly recover. The adverse nature of the claims of the Three Groups lay not in the fact that each of them claimed to be next of kin, *but that each of them claimed that the others were not related at all.* By the contract the Three Groups entered into an alliance of offense and defense and agreed that *if any group prevailed all were to share* in the spoils according to a fixed schedule. The Three Groups became a family by stipulation in a case where the sole issue to be determined by the court was that of family relationship.

This proposed contract between restricted Indians was submitted to the Secretary of the Interior for approval. The Acting Secretary expressed doubt as to the power of the department to approve, and suggested that the approval of the contract might embarrass or prejudice the other parties in this action. The proposed contract was referred to the Department of Justice who forwarded it to the Assistant United States Attorney participating in this case who had been instructed to act merely as the neutral representative of the Government as the stake-holder.

By his own admission the Assistant United States Attorney was an advocate of the Three Groups. (R. 8499-8502) He presented the proposed contract, prior to the trial, to

the trial court and discussed the matter at length. The court expressed the opinion that "if there were a combination or agreement between full-bloods to make a joint effort to defeat the claims of the Negro claimants, as wife and children or other non-Indian claimants, that this probably would not be against public policy." (Curns Exhibit 43.) Subsequently the Acting Secretary of the Interior did approve the contract with the express condition that such governmental approval of the contract should not be construed as a recognition by the Department that the parties to the agreement, or any of them, are in fact the rightful heirs of Jackson Barnett. Despite this position taken in Washington, the Assistant United States Attorney in Oklahoma, without authority of the Attorney General, actively promoted the claims of the Three Groups as though their case was the Government's. (R. 8500-8501) Despite some protestations somewhat to the contrary, the trial court treated the departmental approval as a determination in favor of the Three Groups as the rightful heirs.

6. Both in the conduct of the trial and in his findings the trial court demonstrated he was materially influenced by the so-called census card of Jackson Barnett No. 1419 (Curns Ex. 26). This card was prepared by an unknown employee of the Dawes Commission (The Commission to the Five Civilized Tribes), which was commissioned to determine certain facts and to prepare rolls of citizens by blood and of freedmen citizens. These rolls were prepared from information gathered by a field staff in memoranda on cards. The official approved rolls contain no information or findings as to the parentage. However, card No. 1419 did state "Siah"* was the father and listed Jackson as a "full-blood."

*Other rolls, ignored by the trial court, list Siah as part Negro.

Uncontradicted testimony by Wm. O. Beall, a prominent attorney, and a former member of the field staff of the Dawes Commission, demonstrated that the date on the cards were obtained informally and casually. When individuals were not interviewed personally, information was sought from relatives or neighbors or town tribal rolls. Old rolls were checked; if no information concerning anyone named on these rolls was obtained, such person was arbitrarily listed as dead. No attempt was made to verify the information obtained. As the parentage or degree of blood was immaterial for the purposes of the enrollment, the field staff accepted whatever information was offered as to such matters.* (R. 8372, *et seq.)*

This card is the only documentary record which supports the contention of the Three Groups that a "Siah" was the father and that Jackson was a full-blood. The trial court seized upon this record as practically conclusive that Siah was the father, and that Barnett was a full-blood. As each witness, especially of Negro blood, testified, the trial court openly derided parol evidence and demanded record evidence to refute the census card.** Opponents of the Three Groups contended that the census card was incompetent as hearsay of hearsay from an undisclosed source. The Circuit Court found it was admissible in evidence and entitled to appropriate consideration along with all other evidence. But it was not so treated by the trial court.

7. The trial court persistently throughout the trial evidenced a bias against all claimants and witnesses other than

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*As an illustration the witness recalled the case of Jack Ellis, a quarter-blood Cherokee, who stated he was a full-blood Indian. This statement was accepted and he was so listed on his card. (R. 8407)

**The court stated (R. 1443), "I am just telling you there ain't anybody going to get a finding in their favor on just general talk around, unless they go trace back to some record."

those for the Three Groups, especially persons of Negro blood. The court in finding against petitioners extends itself to brand petitioners (Joe H. Tiger and Annie Ponds) as full-blood negroes despite the showing by every record introduced on their behalf or against them that they are a son and daughter respectively, of a full-blood Indian, and claim collateral relationship to Jackson Barnett through their father and not through their mother who had Negro blood. In another instance, petitioner Lucy Kurns, admittedly part negro, asserted in response to the court's inquiry, that she had a little Indian blood. Without evidence, without hesitation, the court stated for the record a finding then made that she was a full-blood Negro and had no Indian blood in her veins (R. 4086), and added in substance that *he should not be expected to believe the statements of Negro claimants.* (R. 4086-4088) In regard to testimony of statements of deceased persons with reference to the family history of one of the Negro families, the court said, "I always let them put that stuff in and not pay attention." (R. 4077) The court evidently ignored all evidence of such witnesses.

Further, the court harassed attorneys for the claimants other than the Three Groups, interfering both with the direct examination of witnesses, (R. 4077-4088, R. 4147, R. 1400, R. 4766-4773, R. 4870, R. 4995-5008), and curtailing and preventing adequate cross examination of opposing witnesses. A typical example is the case of a claimant, Lucy Curns, 74 years of age, whose examination the court took over and subsequently in a night session permitted cross examination by nine attorneys, of whom no less than three represented one group of claimants involved in the contract. On the other hand, when the witnesses were for the Three Groups, the court interfered with cross examination and even compelled cessation of cross examination. (R. 3731-3735, R. 2826, R. 3659)

8. The Assistant United States Attorney, even prior to the trial, abandoned a neutral position and threw the weight of his office behind the Three Groups. (R. 8499-8500). In October, 1936, he urged upon the court, the Department of Justice and upon the Department of the Interior, the approval of the contract between the Three Groups. He stated he was convinced that the Three Groups should prevail and that the approval of the contract "would materially assist in properly presenting the claims of these full-blood Indians." (Clerk's Tr., Vol. 1, 499-501.) This was prior to the presentation of evidence before the court by petitioners or other claimants opposed to the Three Groups. The only data upon which the United States Attorney made his decision consisted of depositions taken on behalf of the Three Groups and "other information available" to him *(Ibid.)*, obtained presumably in his discussions with the many politically prominent attorneys for the Three Groups. As a federal official, he made an *ex parte* presentation of the case of the Three Groups to the Court prior to hearing of evience for any claimants.

During the trial the Assistant United Atates Attorney actively cooperated with the attorneys for the Three Groups, recalled and examined witnesses to bolster the case for the Three Groups (R. 4293), and when entrusted by the court to prepare findings, adopted those of the Three Groups *verbatim.* (Clerk's Tr. Vol. I, p. 657)

The court repeatedly made threats of grand jury prosecutions. The question of such prosecution was raised by the Assistant United States Attorney. (R. 8529) This federal officer, admittedly partisan, had the power to call and advise grand juries; inasmuch as he accepted and conceded the reliability of the evidence for his claimants, the threat of prosecution was obviously leveled solely at witnesses op-

posing the claims of the Three Groups. These threats were fulfilled; numerous indictments were returned, *before the decision.* The only witnesses indicted had opposed the Three Groups.

9. A special agent for the Federal Bureau of Investigation appeared in the case and was much in evidence in the court room. He worked solely with the attorneys for the Three Groups. He and an attorney for the Three Groups cross examined witnesses in the offices of the attorney. Expenses were paid by the attorney. The Special Agent conferred only with attorneys for the Three Groups. (R. 4322) The court sustained a refusal by the Special Agent to divulge the reason for his presence. (R. 8574) An offer of proof was made to the effect that the Special Agent had been brought into the case through the personal request of a counsel for the Three Groups, through Senator Thomas of Oklahoma, a close friend of the counsel and of the trial court. (R. 8574; R. 8572; R. 8579)

10. Most of the contradictions and confusion in the evidence, as well as in the mind of the court, arise from a fact recognized by the court itself, that there were two Jacksons in the picture up to about 1898. The evidence shows that one was at Billy McCombs' house just after the Civil War, as a little boy. The record shows that this one died in 1898, leaving surviving as his grandchildren, Dora Brady and Lucinda Watashe. The three groups say that this Billy McCombs Jackson was the son of Siah and Betty Conner, and lived until 1934, and is the Jackson in controversy. The undisputed record and oral testimony shows that Betty Conner was born after the Jackson in controversy.

Petitioners claim that the Jackson Barnett involved was the son of Thlesothle, a sister of John Leecher, and lived with his mother, his uncle and his brothers at Leecher's

Ferry throughout his early youth and manhood, and until he was about fifty years old. That he lived at Leecher's Ferry is not only shown by the evidence of some sixty witnesses, it is admitted by all parties to the case.

The trial court finds that Jackson was a resident neither at Billy McCombs, nor at Leecher's Ferry; thus establishing a personality impossible to identify by record or oral testimony. From 1892 he lived near Bryant, until he went to California; but his early years, of course, furnish the appropriate evidence with respect to the kinship of the deceased. The court makes no finding with respect to his residence until he was past middle age; but proceeds to find for the three groups in accordance with their "family agreement."

The Circuit Court of Appeals, faced with "sharp inconsistencies and irreconcilable conflicts in the evidence" upheld the trial court on the ground that there was substantial evidence "implemented by the stipulation" to support the findings. (122 F. (2d) 777, 782)

Specification of Errors.

The Circuit Court of Appeals erred:

1. In failing to find that petitioners were deprived of a hearing in accordance with due process of law because of racial discrimination shown by the court and the partisan participation of the Assistant United States Attorney and a Special Agent for the Federal Bureau of Investigation, influencing the court on behalf of the prevailing Three Groups of claimants, and intimidating witnesses of those opposed to the Three Groups.

2. In interpreting the facts concerning the agreement between the Three Groups so as to hold that the agreement was not contrary to public policy and void.

3. In holding that a census card prepared in the process of perfecting the rolls for the Dawes Commission was admissible and that the trial court was not in error in ruling that the incidental, unverified collateral data on the census card requires "clear, cogent and convincing evidence to the contrary" to overcome such data.

4. In holding that the findings are supported by substantial evidence, "implemented by the stipulation" or agreement, and cannot be disturbed on appeal.

5. In holding that a judgment and decision of the Indian Department in the year 1903 upon the question of who were the heirs of Siah Barnett is not a final judgment, though such Department was specially authorized by Congress to determine the said question and although the prevailing parties herein or their ancestors accepted money under said decision.

Reasons for Granting the Writ.

1. The Bill of Rights contains no more fundamental guarantee than that of due process of law for every person. The trial of this case in the United States District Court discloses a flagrant lack of that due process to which petitioners are entitled. Petitioners are poor, illiterate descendants of Freedmen and citizens of the Creek Nation who claim to be lawful heirs of Jackson Barnett, an Indian ward of the Federal Government. A large estate is in the hands of the Federal Government for distribution. In the legal determination of their claims to this federally held estate, petitioners' constitutional rights have been trampled upon and they must look to this court for protection.

Three competing groups of Indian claimants represented by a large number of powerful lawyers have conspired together to lay a joint claim to the estate. One group changes

its claims—to fit those of its allies. A witness testifies in court contrary to testimony under oath in depositions prepared prior to the agreement—to support the claims of the new allies. Evidence challenging the claims of the others is suppressed—to cooperate with the new allies. *(Supra.)*

The Assistant United States Attorney is enlisted in support of the new allies. He, in the guise of a governmental official, persuades the trial court to approve the contract and talks of perjury by Negro claimants. *(Supra.)* The trial court approves the contracts in advance of hearing evidence because "it was a contract among restricted Indians to defeat the claims of Negroes and other non-citizen claimants." In the course of the trial the Assistant United States Attorney is the active protagonist of the new allies despite the official stand of the Government that he merely represents the neutral stake-holder. A Special Agent of the Federal Bureau of Investigation is imported to work with the new allies. Threats of grand jury prosecutions, the threat of the United States Attorney, the intimidation by the "FBI man"—against all but the protected allies. And the trial court itself having approved the contract, repeatedly indicates bias against the Negro claimants, usurps the function of their attorneys in conducting their own examination and protectively interferes in the cross examination of the witnesses for the three allies.

The Circuit Court found itself constrained to find it was bound by the findings of the trial court* because there was support of substantial evidence, *(1)* "implemented" by the agreement between the allies and *(2)* giving opportunity of the trial court to judge the credibility of the witnesses

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*The trial court was Judge R. L. WILLIAMS, Circuit Judge sitting by assignment as District Judge.

and the weight to be given to their testimony*. But *(1)* the agreement had been approved by the Department of the Interior specifically on condition that it *not* be taken to implement the evidence of the Three Groups. And *(2)* the opportunity for the trial court to judge the credibility of the witnesses was vitiated by the racial discrimination stimulated in large measure by the agreement "among restricted Indians to defeat the claims of Negroes * * * ."

This is not a case for the simple application of Rule of Civil Procedure 52 (a) as found by the Circuit Court. The fundamental rule of due process is in issue. The constitutional issue is properly before this court.

2. The Circuit Court was misled in respect to the actual contentions of the Three Groups, parties to the agreement and approved a contract which under the true facts should be found void as against public policy. The Circuit Court thought that (p. 16) "The persons constituting each group claimed to be nearest and next of kin to the decedent" and "while they had become convinced that the persons constituting each of the other two groups were related to the decedent, the persons constituting each group still contended that they were the next and nearest of kin and were therefore entitled to the estate." These statements are not sustained by the record. No assertion was ever made at any time by any one of the Three Groups as against the others that any relationship existed except the third degree for one group, the fourth degree for the second, and the fourth

*The Circuit Court (p. 24), was critical of some of the statements of the trial court and of its interference in the examination of witnesses. It excused it because of the provocation of certain attorneys. Petitioners hold no brief for other claimants or their attorneys. But petitioners do point out that the activities of the trial court which were criticized tend to color the court's judgment as to the credibility of witnesses.

once removed for the third. Prior to the agreement each group had denied the claim of the others to relationship to Jackson Barnett at all.

On the basis of the facts as the Circuit Court understood them it concluded that the agreement was in the nature of a typical family settlement and as such found it valid. As a matter of fact the agreement created a family by stipulation. The Three Groups abandoned the case each had prepared to demonstrate to the court that the others were in fact not related to Jackson Barnett.

These being the true facts, the agreement between the Three Groups inherently tends to invite or promote interference with full and impartial justice in an action in which the court is called upon to determine the issue resolved by the Three Groups in their own favor by stipulation. The agreement violates public policy and was void in its inception. The agreement was conducive to perjury and whether or not it was for the purpose of withholding evidence it in fact did keep from the record evidence damaging to the Three Groups which adversely affected other claimants. The effect of the agreement on testimony is readily apparent in the case of Rebecca Baker. (R. 10027) In a deposition prior to the agreement this witness swore that nobody knew who the father of Jackson Barnett was (R. 10055), a vital point of contention between the maternal and paternal groups. After the agreement this same witness testified that Siah Barnett was the father. (R. 3896) Prior to the agreement many depositions had been taken to disprove the rival claims of these groups; as a result of the agreement neither these depositions nor the testimony of their makers was put into the record. Had this evidence, peculiarly in the hands of the Three Groups, been made available to the court it may well have caused a contrary decision by the court.

A comparison of the pleadings of the maternal groups when they acted independently with the findings requested by them after the agreement indicates a complete change of story. The Conner Group (R. 211-218) plead that Thlesothle was unmarried, and had only one child—Jackson. It requested findings that Thlesothle not only was married to Siah Barnett but also the mother of several children. The two groups claiming under the alleged mother also pleaded that Siah Barnett was estopped, as were his heirs, to claim that Siah was the father of Jackson because of the judgment and decision of the Indian Department in the so-called Loyal Creek claim asserted by Siah in 1869 and completed by payment to the heirs after a decision as to the heirs in 1903. These assertions were also abandoned after the contract was entered into.

This contract constituted an agreement among these persons "not to oppose each other"; it is a fictitious claim of relationship opposed to prior claims; it is in no sense an admission of family relationship but a diplomatic abandonment of properly asserted claims for the sake of harmony and to obtain an advantage over all other claims.

The agreement is contrary to public policy primarily because it achieves exactly what the Department of the Interior feared and tried to prevent. Despite the Department the agreement became the most potent "evidence" for the Three Groups. Despite lip service to the contrary the trial court considered the agreement in the nature of an administrative determination of the heirship. The Circuit Court of Appeals specifically finds substantial evidence only when "implemented by the stipulation" sufficient to support the findings of the trial court.

This agreement was the core of the prevailing claimants' case. Through the agreement it rallied the support of

the Assistant United States Attorney and obtained the services of the F. B. I. for private purposes. Through these channels it won the confidence of the trial court. All by stipulating to the issue. Had these Three Groups been put to their proof, the entire record would have been vastly different.

3. Second in importance in the framework of the rulings of the trial court only to the agreement was the weight placed upon the census card in the records of the Dawes Commission. In this connection the trial court violated the rule set down by this court in *Hegler* v. *Faulkner,* (153 U. S. 109). The census card, of all the documentary evidence, was the only record to state that "Siah" was Jackson's father, and to state further that Jackson was a full-blood. Both items of information were only collaterally and incidentally in question in the inquiry of the Dawes Commission. The duty of this Commission was to prepare a list of living Indians and Freedmen to be allotted land. The actual rolls prepared in the exercise of this *quasi*-judicial function in fact did not include the details mentioned above. The record discloses that this collateral data was at best hearsay on hearsay. *(Supra.)* But it tended to support the stipulations between the Three Groups. The trial court made it the touchstone for all testimony by claimants of Negro blood claiming relationship to Jackson Barnett. The court took the statement on the card that Barnett was a full-blood Indian as practically conclusive* and challenged and disregarded oral evidence to the contrary as not being "clear, cogent or convincing evidence" in the face of this card. On the basis of this card the court constantly asserted that Negroes could not be related to Barnett, a full-blood.

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*Despite the fact that other records show Siah, the alleged father, to have Negro blood, etc. See *supra.*

Upon protest that this card was incompetent evidence for any purpose, that it is merely a memorandum by an employee of the Dawes Commission of hearsay on hearsay from an undisclosed source, the Circuit Court held that such incidental and collateral statements were admissible "for appropriate consideration." The trial court, however, considered this hearsay as practically conclusive. In conflict with the decision of this court in *Hegler* v. *Faulkner*, 153 U. S. 109, this action of the trial court, acquiesced in by the Circuit Court, again demonstrates the wisdom of the *Hegler* decision. The Acts of Congress involved in the *Hegler* case are almost exactly analogous to that setting up the Dawes Commission. In that case this court said:

> "A judgment is not evidence of any matter to be inferred by argument therefrom or which comes *collaterally* in question or is *incidentally* cognizable. * * * Our conclusion is that the court below did not err in excluding the list offered * * * (p. 655) filed in the Office of Indian Affairs containing the names and ages of half-breeds * * * to prove the age of one of said Indians."

Had the trial court properly appraised this single piece of "evidence," that alone would have vitally affected the conduct of this trial.

4. Apart from approving the agreement which it considered "implemented" evidence for the Three Groups and apart from condoning the use to which the Census Card No. 1419 was put by the trial court, the Circuit Court of Appeals erred in standing simply on the substantial evidence doctrine of Rule of Civil Procedure 52 (a) and failing to consider parts which made the findings of the trial court untenable.

a. Physical impossibility that Betty Conner, as the first wife of Siah, was the mother of Jackson and Tecumseh.

Finding for the Three Groups, the trial court found Betty Conner to be the mother of the Jackson Barnett who died in 1934, and of his brother Tecumseh. An examination of enrollment records of the Conner family (Conner Exhibits 53, 17, 16, 15, 13) taken in conjunction with uncontradicted testimony of the Conner Group about Betty Conner (R. 13207-13220, R. 7818-7835) demonstrated Betty Conner was born after 1850, the year a brother older than she was born. Pension records of Tecumseh who fought in the Civil War establish Tecumseh was born about 1838. On the documentary records, the trial court's findings have Betty the mother of a son born a decade before she was. Jackson Barnett himself, on the record, was about as old as this purported mother.

Before the Circuit Court of Appeals, attorneys admitted there was a "discrepancy" but stated in a supplemental brief that either the documentary records are erroneous or one of their witnesses was in error. No explanation was offered as to the detailed supporting testimony by their other witnesses.

The Circuit Court passed no judgment on this vital internal conflict in the case of the Three Groups.

b. The determination of the Department of the Interior of the heirs of Siah Barnett in 1903 is a final adjudication that Jackson was not his son. In 1903 when the evidence of family relationships was much more readily ascertainable the Department of the Interior made a *quasi*-judicial finding of the heirs of Siah Barnett—Jackson was not among them. The occasion was the payment of awards to the Loyal Creeks of the Civil War or their heirs. Inasmuch as Siah was dead the duty devolved upon the Department of the Interior to determine the rightful heirs.

The Circuit Court stated (122 F. (2d) 782) "the award merely described the property loss and fixed the amount to be awarded" and that the determination of the heirs was not conclusive. However, the court overlooked the direction in the Act of Congress approved March 3, 1903, 32 Stat. L. 982, that awards be paid to heirs of deceased Loyal Creek Indians such as Siah. Reports of the Commissioner of Indian Affairs, June 30, 1904, and June 30, 1905. Such a decision called for by the Congress in regard to Indian Affairs is final, conclusive and binding. *Norton* v. *Larney,* 266 U. S. 511; *Kimberlin* v. *Commission,* 104 Fed. 653, 44 C. C. A. 109; *Hegler* v. *Faulkner,* 153 U. S. 109.

Conclusion.

The questions involved are of vital importance and call for an authoritative ruling by this Court. The constitutional issues involved are of as much importance to the public at large as they are to the litigants. The decision of the court below is in conflict with a decision of this Court. It involves the affairs of Indians, wards of the Federal Government, whose rights are always jealously guarded by this Court. For the reason stated, therefore, it is respectfully submitted that this petition for a writ of *certiorari* should be granted.

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